90-1614

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYMAN B. PRITCHARD, ANNA L. PRITCHARD,
and ENTERPRISE WASTE OIL, INC.,

PETITIONERS

v.

LOUDON COUNTY, EX REL,
DOUG LAWRENCE, BUILDING COMMISSIONER,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF LOUDON COUNTY, EX REL, DOUG LAWRENCE, BUILDING COMMISSIONER,

RESPONDENTS

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SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF RESPONDENTS

STATEMENT OF THE CASE

This action was originally brought by Respondents in the Chancery Court of Loudon County, Tennessee seeking to enjoin the Petitioners' operation of a petroleum reprocessing facility in a rural area zoned

for residential purposes. The Petitioners defended on the basis that the zoning ordinance was being enforced against them in an unconstitutional manner. Specifically, as stated at page 15 of the Petition for Writ of Certiorari, Petitioners assert an equal protection claim in that "the Loudon County Zoning Ordinance as applied to them, is being unconstitutionally applied because the Petitioners contend that it is being enforced in a selective and discriminatory fashion against the Petitioners while numerous other individuals and businesses in Loudon County, Tennessee are being permitted to engage in industrial and commercial businesses and uses in property zoned solely for residential or agricultural uses."

Following a three day trial, the Chancellor issued a Memorandum Opinion dated April 11, 1989 finding: (1) that the Petitioners failed to show that the

Respondents intended in any way to discriminate against them in the enforcement of the ordinance and (2) that the ordinance had not been enforced in an arbitrary or selective manner as to Petitioners and others similarly situated in that there was "no similarity between the commercial activities which the Board of Zoning Appeals has approved as 'special exceptions' and the defendants' petroleum reprocessing facility."

Petitioners thereafter timely instituted an appeal in the Court of Appeals of Tennessee. On August 28, 1989 the court ordered the Petitioners to file an abridged record pursuant to Rule 14 of the Tennessee Rules of Appellate Procedure. Beginning in October of 1989, counsel for Petitioners, on the basis of his health, sought and received eight (8) extensions of time to file a brief and abridged record as required by the Tennessee Rules of Appellate Procedure and the

order of the court. On January 26, 1990, Respondents filed a Motion to Dismiss for Failure to Prosecute. On February 15, 1990, Petitioners filed their brief which did not comply with the requirements of Rule 27 of the Tennessee Rules of Appellate Procedure that such brief contain appropriate references to the record. Further, no abridged record was filed. On February 20, 1990, Respondents filed a Motion to Dismiss for Failure to Comply With the Orders of the Court based on the above.

On April 4, 1990 the Court of Appeals entered an order, in response to yet another motion for additional time on the part of Petitioners, requiring that counsel for Petitioners file affidavits and exhibits on or before April 12, 1990 demonstrating medical proof of counsel's condition since October of 1989, together with a medical prognosis as to when counsel could be expected to perform the

usual and customary duties of his occupation.

On August 22, 1990, Respondents filed a Continuing Motion to Dismiss for Failure to Prosecute and Comply With the Orders of the Court. Respondents asserted that the April 4, 1990 order of the court had not been complied with, that a document entitled "Abridged Record" filed by the Petitioners on August 1, 1990 did not comply with the requirements of Rule 14 of the Tennessee Rules of Appellate Procedure, and that the brief of the Petitioners had not been corrected to bring it into compliance with the requirements of the Rules.

On September 12, 1990, the Court of Appeals dismissed the appeal for good cause. On October 12, 1990, counsel for Petitioners filed a Motion to Alter or Amend Order of September 12, 1990 before the Court of Appeals asserting that he had filed the disputed affidavits, that he should be allowed to

supplement the brief so that it would be properly filed and that the abridged record filed was appropriate, but if not, he should be allowed to correct it. On November 8, 1990, the court denied Petitioner's motion.

On December 10, 1990, Petitioners filed an Application for Permission to Appeal on Behalf of Appellants Wayman B. Pritchard, Anna L. Pritchard and Enterprise Waste Oil, Inc. in the Supreme Court of Tennessee. Counsel for Petitioners again asserted that the disputed affidavits had been filed and attached copies of certain documents to his Application. However, such documents had no certificate of service as required by the Tennessee Rules of Appellate Procedure and had apparently never been officially filed by the Clerk for that reason and were not a part of the official court file. In an Answer to Application for Permission to Appeal to Supreme Court, the Respondents asserted the Application was not

timely filed and was not well taken in any event. On January 14, 1991, the Supreme Court of Tennessee denied the Application on consideration of the Application and the entire record in the cause.

SUMMARY OF ARGUMENT

The Petition should be denied in this matter for the following reasons. The failure of the Petitioners to prosecute their appeal and comply with the orders of the Court of Appeals, and to timely file an Application to Appeal to the Supreme Court of Tennessee constitute an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. Further, due to the above actions of the Petitioners, there has been no decision of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal

question on that basis. In any event, the equal protection claim of the Petitioners was fully considered and correctly decided before the trial court.

ARGUMENT

There Is an Independent and Adequate State Ground for the Decision of the Tennessee Courts

There is no jurisdiction to review a state court judgment resting on adequate non-federal grounds. This is known as the independent state ground doctrine and the state ground can be either substantive or procedural. 12 Moore's Federal Practice Paragraph 511.01 provides a discussion on this doctrine. As set out by the cases therein, the procedural rule has to serve a legitimate state interest and has to have been consistently applied by the state. In any event, the rule is that: "Failure to present a federal question in conformance with state

procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512, n. 7 (1978).

It is clear that in this case there has been a failure to present the federal question in conformance with Tennessee procedure. Unquestionably, the health problems of counsel for Petitioners are regrettable. However, it is clear that during the time frame in question in connection with this matter, counsel for Petitioners had been working on some basis and had ample time and opportunity to withdraw from this matter and allow someone able to perform to prosecute the appeal in a timely manner. The Petitioners failed to timely file their brief as required by the Tennessee Rules of Appellate Procedure and as ordered by the court in that it was submitted

without the appropriate page references. Likewise, the Petitioners failed to file an appropriate abridged record as required by the Rules and as ordered by the court. Finally, the Petitioners failed to properly file the affidavits concerning medical treatment as ordered by the court.

Further, the Petitioners' failure to timely file an Application to Appeal to the Supreme Court of Tennessee also constitutes an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. On September 12, 1990, the Court of Appeals dismissed the Petitioners' appeal. On October 12, 1990, Petitioners filed a Motion to Alter or Amend Order of September 12, 1990 and did not file an Application for Permission to Appeal until December 10, 1990. Rule 11 of the Tennessee Rules of Appellate Procedure provides the

procedures for filing an application for permission to appeal. Rule 11(b) provides that the application shall be filed within 30 days after the entry of the judgment or denial of a petition for rehearing. It is undisputed the Petitioners did not file an application for permission to appeal within the above time period. Further, Rule 39(b) requires that petitions for rehearing be filed within 10 days after entry of the judgment. Again, Petitioners did not file a petition for rehearing within this time period. Rather, Petitioners filed the unusual Motion to Alter or Amend 30 days after the judgment. This motion did not constitute an application for permission to appeal under the Tennessee Rules of Appellate. Further, even if the motion could be considered to be a petition for rehearing, it was untimely in that regard.

Rule 2 of the Tennessee Rules of Appellate Procedure allows for suspension of

the rules for good cause except as to extensions of time to file notices of appeal, applications for permission to appeal and petitions for review. Although counsel for petitioners submitted that his health problems constituted good cause for relief from the rules, it appears the Court of Appeals and the Supreme Court of Tennessee found otherwise. In Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963), the Supreme Court of Missouri held that, as used in a statute, "good cause" "depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which the decision is committed." Clearly, it was within the discretion of the Court of Appeals and the Supreme Court of Tennessee to determine that there was not good cause shown to suspend the operation of the rules under the facts of this case.

In any event, Petitioners' Application for Permission to Appeal was untimely filed and this requirement cannot be suspended under Rule 2. In John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983), the court held that under Rule 2 appellate courts are expressly prohibited from extending the time allowed for taking appeals, that the time limits of the Rules in that regard were mandatory and jurisdictional, and that the "rules for perfecting an appeal must be strictly complied with and are not subject to waiver." See also G.F. Plunk Construction Co. v. Barrett Properties, Inc., 640 S.W.2d 215 (Tenn. 1982); Brumlow v. Brumlow, 729 S.W.2d 103 (Tenn Ct. App. 1986).

The state of Tennessee has a legitimate interest in enforcing the above procedural rules. Clearly, as determined by the Court of Appeals and Supreme Court of Tennessee, these failures to present the federal question in

conformance with state procedure constitutes an adequate and independent ground of decision which bars review in this Court. Michigan v. Tyler.

There Is No Judgment of the Highest Court of the State of Tennessee

The other jurisdictional rule that comes into play in this situation is the rule that the Court's jurisdiction to review state court judgments is limited to judgments of the highest court of the state in which decision could be had. 16 Wright & Miller, Federal Practice and Procedure Section 4007 states:

> In addition to seeking review by the proper method, a litigant must comply with the requirements of state appellant procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, "the case stands as though no appeal has been prosecuted from the judgment rendered by the trial court." In this setting, the requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground

> doctrine. Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal questions, as not properly presented to the highest state court.

In Newman v. Gates, 204 U.S. 89 (1907), an appeal had been dismissed by the Supreme Court of Indiana on the basis that a necessary party had not been brought into the appeal. The Supreme Court of the United States held:

> Had the appeal been properly taken it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had,

> and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Id. at 95.

Therefore, due to the above actions of the Petitioners, there has been no decision of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal question on that basis.

The Equal Protection Claim Was Fully Considered and Correctly Decided by the Trial Court

Following a three day trial, the Chancellor issued a Memorandum Opinion dated April 11, 1989 finding: (1) that the Petitioners failed to show that the Respondents intended in any way to discriminate against them in the enforcement of the ordinance and (2) that the ordinance had not been enforced in an arbitrary or

selective manner as to Petitioners and others similarly situated in that there was "no similarity between the commercial activities which the Board of Zoning Appeals has approved as 'special exceptions' and the defendants' petroleum reprocessing facility."

These findings of the Chancellor are fully supported by the evidence and are in accordance with the law as developed by the courts in this area. "It is well settled that enforcement of an otherwise valid zoning ordinance violates the Constitution only if: (1) the decision of the particular zoning body is arbitrary, or (2) if the ordinance is applied or enforced with a discriminatory intent or purpose." Scudder v. Town of Greendale, 704 F.2d 999, 1002 (7th Cir, 1983) (citations omitted). In Scudder, the plaintiff had sought permits to build a residence on real property he had acquired which did not front on a street. The permit

was denied based on an ordinance providing that all buildings be erected on a lot which fronts on a street. The court held that a particular decision or action is arbitrary if reached "without adequate determining principle or was unreasonable." Id. (quoting United Sates v. Carmack, 329 U.S. 230, 243 (1946)). The court held the decision there was not arbitrary since a valid ordinance prohibited building on lots with no frontage and the plaintiff's lot had no frontage. Applying this analysis to the present case, it is clear the decision of Respondents was not arbitrary. Unquestionably, the property in question was zoned residential and was being used by Petitioners for a petroleum reprocessing facility. Accordingly, the determination by Respondents that such use was in violation of the zoning ordinance was not arbitrary.

As set out in Scudder, a zoning

determination can also be violative of equal protection if applied or enforced with a discriminatory intent or motive. The Scudder court discussed this requirement as follows:

> Similarly, the record is silent of any evidence to support the plaintiff's theory that the ordinance was applied in a discriminatory manner. As this court in Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 (8th Cir. 1980) stated:
>
> > "a claim under section 1983 for discriminatory enforcement of zoning regulations must involve an element of 'intentional or purposeful discrimination.' Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497; Tollet v. Laman, 497 F.2d 1231 (8th Cir. 1974). There must be allegations of 'unfair and discriminatory conduct purposefully directed toward plaintiffs.'"
>
> In Snowden v. Hughes, 321 U.S. 1, 1, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944), the Supreme Court set forth how "intentional or purposeful discrimination" in the enforcement

of a valid law or ordinance may be shown:

> "[Intentional or purposeful discrimination] may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. But a discriminatory purpose is not presumed, there must be a showing of 'clear and intentional discrimination.'"

The record in this case is completely devoid of any evidence upon which to base even an inference of "clear and intentional discrimination" on the part of the Board of Trustees. The plaintiff puts great emphasis on the fact that Weaver, the adjoining landowner, submitted a letter to the Board asking that they deny Scudder a permit to build on the lot in question. Certainly, the federal Constitution does not prohibit a citizen in a democratic society from voicing an opinion to a duly elected official; regarding the denial or issuance of a building permit.

Id. at 1002-03.

In Christian Gospel Church v. San Francisco, 896 F.2d 1221, (9th Cir. 1990), a church was denied a conditional use permit to construct a church in a residential area and brought an equal protection claim. The court held that any equal protection claim requires "a showing that a class that is similarly situated has been treated disparately." Id. at 1225.

In Scudder, the court found no discriminatory purpose on the part of the Board. In the present case, the trial court correctly found no evidence of purposeful discrimination and, in any event, it is undisputed that Petitioners presented no evidence of selective treatment being given to another similarly situated to the Petitioners, i.e. engaging in industrial activity. It is a rare instance when a zoning decision implicates the federal Constitution. As

stated by the court in Scudder, it is not the function of the federal courts to serve as zoning appeal boards since to do would further congest an already overburdened court system. 704 F.2d at 1003.

CONCLUSION

The Petition for Certiorari should be denied. The Petitioners failed to prosecute their appeal and to comply with the orders of the Court of Appeals, and to timely file an Application to Appeal to the Supreme Court of Tennessee. This failure constitutes an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. Further, due to the above actions of the Petitioners, there has been no decision of the state of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal

question on that basis. In any event, the equal protection claim of the Petitioners was fully considered and correctly decided before the trial court. The decision of the Respondents was not arbitrary and there was no showing of clear and intentional discrimination on the part of Respondents.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition of Respondents has been properly mailed, postage prepaid, to W.P. Boone Dougherty, Attorney at Law, 307 Medical Arts Building, 603 W. Main Avenue, Knoxville, Tennessee 37902, on this 10 day of May, 1991.

Harvey L. Sproul